# DaimlerChrysler

DaimlerChrysler Corporation
Stephan J. Speth
Director
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August 26, 2002

The Honorable Jeffrey W. Runge, M.D.
Administrator
National Highway Traffic Safety Administration
400 Seventh Street, S.W.
Washington, D.C. 20590

**RE: Federal Motor Vehicle Theft Prevention Standard; Notice of Proposed Rulemaking (67 Fed. Reg. 43075); Docket No. NHTSA-2002-12231**

Dear Dr. Runge:

DaimlerChrysler Corporation (DCC), a wholly owned subsidiary of DaimlerChrysler Aktiengesellschaft, Stuttgart, Germany (DCAG) hereby submits the following comments on behalf of Mercedes Benz, USA LLC (MBUSA) to the National Highway Traffic Safety Administration (NHTSA or the Agency) regarding the proposed rulemaking to expand the parts marking provisions of the Anti-Theft regulations at 49 C.F.R. Part 541 to all vehicle lines. 67 Fed. Reg. 43075 (2002). MBUSA is the authorized importer and distributor of Mercedes-Benz vehicles in the United States and a subsidiary of DCAG, which is the original manufacturer of Mercedes-Benz vehicles with headquarters in Germany. The Company currently produces seven different car lines for the U.S. market.

As the Agency is aware, the Federal Motor Vehicle Theft Prevention Standard specifies requirements for the placement of identifying numbers or symbols on major parts of certain passenger motor vehicles. Current parts marking requirements mandate that manufacturers generally need only mark those vehicle lines designated as "high-theft." See 49 C.F.R. parts 541 & 543. Under the current regulatory provisions, manufacturers may be exempt from parts marking either by demonstrating that a vehicle should not be classified as "high theft," id. Part 541, Appendix C, or by applying for an exemption for vehicles classified as "high theft" but equipped with anti-theft devices as standard equipment. Id. part 543.

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On June 26, 2002, pursuant to the Anti Car Theft Act of 1992, NHTSA issued a notice of proposed rulemaking to expand the provisions of the parts marking requirements to all vehicle lines produced by a manufacturer. The Anti Car Theft Act of 1992 requires NHTSA to extend parts marking requirements to all passenger cars and multipurpose passenger vehicles with a gross vehicle weight rating (GVWR) of 6,000 pounds or less, unless the Attorney General finds that such a requirement would not substantially inhibit chop shop operations and motor vehicle thefts. 49 U.S.C. § 33103.

As noted in the NPRM, in July 2000, the Attorney General recommended to NHTSA that parts marking should, in fact, be extended to cover all vehicle lines. See Letter from Janet Reno, Attorney General, to Rodney Slater, Secretary of Transportation, at 1, 4 (July 21, 2000) (hereafter, Attorney General's Initial Report). MBUSA recognizes the limited nature of NHTSA's discretion, given the statutory constraints of the Anti Car Theft Act, but nonetheless notes that NHTSA failed to address a number of important statutory factors before applying an extended parts marking requirement. Specifically, MBUSA notes the following:

- The Attorney General's findings fail to adequately consider the statutory criteria and thus are flawed under the Administrative Procedure Act. As outlined in further detail below, the Anti Car Theft Act requires the Attorney General to take into account a number of factors in issuing her report. These factors include: insurance information, additional costs, effectiveness, competition, and available alternative factors. A review of that report demonstrates, however, that the Attorney General failed to consider all such factors or provided only cursory review of those factors

- The Anti Car Theft Act imposes strict limits on the compliance costs that may be imposed on a manufacturer from the parts marking requirements. NHTSA's calculation of the projected cost grossly underestimates the actual cost that will be incurred by manufacturers, specifically DCAG. In addition, NHTSA must provide an alternative for those manufacturers whose cost exceeds the statutory limit.

- MBUSA agrees that NHTSA should continue to allow exemptions from the requirements of parts marking. The

Agency must, however, address several inconsistencies associated with exemptions in the NPRM.

- With increasing globalization and harmonization of vehicle manufacturing and standards, NHTSA should take into consideration the ECE efforts in reducing vehicle theft, especially in light of the Agency's ongoing commitment to harmonization of international standards wherever feasible.

In addition to the foregoing, MBUSA also agrees with and supports the comment submitted by the Alliance of Automobile Manufacturers with respect to their positions on the need for modified parts marking methods and the marking of additional parts such as airbags and glazing.

## I. ANALYSIS

### A. Deficiencies in the Attorney General's Report

The Anti Car Theft Act delegates to the Attorney General the authority to recommend expansion of parts marking requirements beyond high-theft vehicle lines if, after consideration of a number of factors, the Attorney General deems such recommendation warranted. See 49 U.S.C. § 33013(b). With regard to the factors that must be considered, the recommendation for expansion must be based on insurance reports and information collected under § 33112 of the statute. In addition, the Attorney General must consider additional costs, effectiveness, competition, and available alternative factors. 49 U.S.C. § 33103(c). Finally, the statute requires that the Attorney General submit her findings and the record on which the findings are based to the Secretary of Transportation. Id. Based on a review of the report, however, it appears that there are a number of deficiencies in the way in which the Attorney General followed these statutory mandates. In fact, MBUSA believes that these deficiencies are significant enough that moving forward with the expansion of the parts marking requirements to all vehicle lines would be an arbitrary and capricious exercise of NHTSA's rulemaking authority under the Administrative Procedure Act, 7 U.S.C. § 553 et seq. (APA).

As noted above, the statute requires that the Attorney General's recommendation be based on insurance information submitted under the statute. However, there is indication that this information may not support the Attorney General's conclusion that parts marking should be extended to remaining vehicle lines. Specifically, we note that the Attorney General's Initial Report attaches a summary of comments received by the Department of Justice (DOJ) in response to its public notice on theft prevention. As part of that summary, there is a statement, listed under Volvo Cars of North America and Volvo Car Corporation, that provides as follows: "Insurance data supports no marking for low theft cars with anti-theft devices." Attorney General's Initial Report, Summary of Public Comments Received in Response to DOJ Publication: Auto Theft and Recovery: Request for Comments, 63 F.R. 48758, at 1.

Although the Attorney General's Initial Report states that its findings were based on a review of a cross-sectional time series analysis of auto theft data provided under § 33112, Attorney General's Initial Report at 2, it does not appear that all relevant information was considered, especially in light of the comments submitted by Volvo. In addition, MBUSA is aware of additional data from insurance companies that support the Volvo comment that anti-theft devices are an effective deterrent against theft – even more so than parts marking. For example, as noted by the Alliance of Automobile Manufacturers (Alliance) in its comments, insurance data demonstrates that anti-theft devices are working well in the real world. See Attachment A to the comments filed by the Alliance.

The statute also requires that the Attorney General consider additional costs, effectiveness, competition, and available alternative factors in making its findings regarding extension of the parts marking requirement. Again, on the face of the report, the Attorney General does not appear to have followed the statutory mandate. In making its findings, the Attorney General relied heavily upon a report prepared by a contractor, Abt Associates, concerning the effectiveness of parts marking. The Abt Associates report acknowledges that the contractor could not make a judgment as to whether anti-theft exclusions were a good substitute for parts marking, due to inadequate data. Abt Associates Inc., An Evaluation of the Effectiveness of Automobile Parts Marking on Preventing Theft at iii (rev. final report July 1, 1999). Indeed, the contractor noted that

> [a]lthough the analysis showed that anti-theft devices can reduce automobile thefts, the effectiveness of anti-theft devices is almost surely understated in the analysis reported earlier. Even if this were not true, the analysis does not provide

> a sound basis for saying whether anti-theft devices are good substitutes for parts marking.

Id. at 25. The Abt report goes on to acknowledge the possibility that anti-theft devices "could reduce the automobile theft rate to a level that was so low that parts marking would cease to be cost effective," but states that "[s]uitable data" for analyzing this possibility "are not available." Id.

We note that in addition to the initial review required by the Anti-Car Theft Act, the Attorney General must also complete a study on the effectiveness of anti-theft devices. This report has not been completed, despite the statutory due date of December 31, 1999. 49 U.S.C. § 33103(d). Congress, in enacting the statutory provision and deadline, presumably contemplated that this information on effectiveness would be available to the Attorney General when she made her findings regarding expansion of parts marking requirements. Unfortunately, that information still is not available. As a result, MBUSA raises questions as to how the Attorney General could have properly considered effectiveness and available alternative factors when her contractor was unable to reach a conclusion regarding the effectiveness of anti-theft devices, and her own statutorily-required effectiveness review was unfinished (and indeed remains unfinished, nearly three years after the statutory deadline). MBUSA also notes that the Attorney General's report makes no mention of actual theft rates, and questions how the Attorney General could have properly considered effectiveness without reviewing actual vehicle theft rate information.

In addition to the deficiencies noted above, the Attorney General also appears not to have fully considered competition in compiling her report. Specifically, the Attorney General's report appears to give short shrift to the impact of parts marking on competition, devoting only one paragraph in its report and citing one comment received in response to her request for comment. Attorney General's Initial Report at 7. The report does not appear to consider such factors as resources spent by automobile manufacturers in the development of anti-theft devices, including resources devoted to educating the public and NHTSA officials about the benefits of these devices. Moreover, there is no mention of the competitive disadvantage to manufacturers of low-theft vehicle lines when they lose those low-theft rankings. Low theft classifications currently provide an important marketing benefit. In addition, the report fails to consider the additional negative impact on manufacturers, such as MBUSA, who currently have no parts marking capability.[1] Furthermore, because Mercedes introduces new vehicle lines much more frequently than other manufacturers, and because the parts marking requirements are imposed on vehicle lines and exemptions are limited to only one vehicle line per year, the company will suffer an additional competitive disadvantage because of its unique marketing and categorization practices. However, the Attorney General's report simply fails to address these factors.

For these reasons, MBUSA does not believe that the mandated factors detailed in the statute have been adequately considered. Under APA standards, an agency's action must be set aside if it is arbitrary, capricious, or an abuse of discretion, or if it exceeds statutory jurisdiction, authority or limitations. See 5 U.S.C. § 706. Because the Attorney General's report fails to take into account the mandatory statutory criteria, MBUSA believes that the report is fundamentally flawed. Accordingly, in conformance with APA requirements, NHTSA may not base a rulemaking upon the flawed Attorney General's report.

### B. The Costs Imposed by the Proposed Rule are Unnecessary and Excessive

As noted above, MBUSA is the authorized importer and distributor of Mercedes-Benz vehicles. MBUSA and DCAG recognize the importance of implementing procedures to assist in the prevention of vehicle theft. For example, within DCAG's facilities, theft parts are subjected to special processing and handling procedures from their manufacture to their transport through to the assembly process. This process is continuously undergoing improvements. For example in January 2002, MBUSA implemented procedural instructions to prevent mistakes and mishandling of theft-relevant parts. Security measures are carried out in fabrication,

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[1] We note that the NPRM also requests comment on the possibility of requiring more permanent markings, although this possibility is not addressed in the instant rulemaking. 67 Fed. Reg. at 43080-91. This raises the possibility that marking requirements may change in the foreseeable future, adding to the burden facing manufacturers who would have to purchase marking equipment and train employees in order to comply with the September 1, 2005 effective date of the proposed rule, and then possibly have to purchase additional equipment and retrain employees when different and more permanent marking requirements are imposed.

assembly, spare part facilities, field service organizations, suppliers and forwarding agents to guard against: theft and falsification of vehicles and parts, unauthorized duplications of vehicle related markings and identification plates, surveillance of security systems by criminal organizations, espionage of the manufacturing processes, and loss or theft of confidential information and data. DCAG's commitment to theft prevention extends beyond the factory to vehicles in use as well. For example, all Mercedes-Benz vehicles are equipped with immobilizers and other anti-theft devices as standard equipment. As a result, all Mercedes-Benz vehicle lines are designated low theft. The vehicles therefore are exempt from parts marking pursuant to 49 C.F.R. Part 541.

The classification of all Mercedes-Benz vehicle lines as low theft is justified in that all Mercedes-Benz vehicles have theft rates well below the national median. This impressive record demonstrates the effectiveness of the immobilizer and other anti-theft devices employed as standard equipment in these vehicles. In fact, since DCAG began incorporation of immobilizer theft prevention technology to its Mercedes-Benz line of vehicles in the mid-1990s, theft rates on certain models have declined by as much as 60 percent. Because of this, extension of parts marking to low-theft Mercedes-Benz vehicles such as those produced by DCAG is unnecessary.

In addition, extension of parts marking requirements is also cost-prohibitive to DCAG because the Company does not currently perform parts marking on its Mercedes-Benz vehicles, does not own any parts marking equipment for these lines, and does not employ any Mercedes-Benz workers with parts marking expertise. Based on calculations performed by the Company, the cost of implementing parts marking to all of its vehicle lines will result in an additional expenditure that exceeds the Theft Prevention Act's limits. Specifically, the Theft Prevention Act prohibits imposing compliance costs on a manufacturer in excess of the statutorily defined limit. The Act expressly provides that a standard may not impose "on a manufacturer of motor vehicles, compliance costs of more than $15 a motor vehicle." 49 U.S.C. § 33105(a)(1). NHTSA indicates in the proposed rule that this statutory limit, in 2000 dollars, is $24.86 per vehicle. See 67 Fed. Reg. 43078. NHTSA also indicates that it estimates the cost of parts marking under the proposed rule at $6.03 per vehicle. Id. NHTSA derived this figure by applying the Consumer Price Index to the finding of a 1988 NHTSA study that the average cost of parts marking was $4.14 per vehicle in 1988 dollars. NHTSA states that the adjusted cost of $6.03 per vehicle is "well within the statutory limit of $24.86." Id. Despite NHTSA's findings, DCAG's analysis demonstrates a much different result.

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] Imposition of such a requirement, especially in light of the presence of more effective theft deterrent systems in Mercedes-Benz vehicles, would be cost prohibitive. Moreover, such costs would place Mercedes-Benz vehicles at a significant competitive disadvantage to other manufacturers' vehicles. A more detailed breakdown of DCAG's costs and the analysis used to arrive at those costs will be submitted to NHTSA under separate cover once that analysis has been finalized. Regardless, based on these preliminary calculations, MBUSA does not believe that NHTSA should extend parts marking requirements to the low theft Mercedes-Benz vehicles due to the cost-prohibitive nature of these new requirements.

In addition, Mercedes-Benz notes that the Theft Prevention Act does not prescribe nationally-derived average cost limits, but rather expressly prohibits imposing on "a manufacturer" a "cost per vehicle" greater than the statutory limit. Thus, NHTSA's estimate of national average costs that are less than the statutory limit is not sufficient to comply with the statute, which expressly specifies that the limit refers to the cost per vehicle to a manufacturer. Moreover, NHTSA's proposed rule does not include any provisions to address the circumstances of particular manufacturers that may in fact have compliance costs much higher than the statutory limit, and thus fails to comply with the statutory requirement that no standard issued under the Act may impose on a manufacturer costs greater than the statutory limit.

If NHTSA were implementing a general statutory directive to ensure reasonable costs, then basing compliance with the cost directive on national average cost estimates might be an appropriate approach. However, it is well established that when a statute directly speaks to an issue, an agency's discretion is limited. Where "the intent of Congress is clear," agencies "must give effect to the unambiguously expressed intent of Congress." Chevron, USA, Inc. v. NRDC, Inc., 467 U.S. 837, 842-43 (1984). Section 33105(a)(1) expressly prohibits the agency from imposing a standard that imposes on a manufacturer of motor vehicles costs higher than the statutorily defined maximum.

Thus, NHTSA cannot comply with the Act's cost-limit provision unless it provides within the proposed rule some alternative compliance option for manufacturers whose compliance costs per vehicle for parts marking its entire fleet are higher than the statutory limit. MBUSA recommends that NHTSA allow such manufacturers who can document such higher costs to continue to exempt from the parts marking requirement those vehicles in its fleet in which antitheft devices are installed as standard equipment.

### C. NHTSA's Exemption Procedure Regulations Are Flawed

In the NPRM, NHTSA states that the proposal "would have no effect on exemptions from the parts marking requirements" and that "[m]anufacturers would still be allowed to petition the Agency to exempt one new line each model year, if the line is equipped with an anti-theft device as standard equipment." 67 Fed. Reg. at 43081-82. Under the existing exemption provisions, manufacturers of vehicles designated as high-theft may petition the Agency to exempt one vehicle line per year, if the Agency finds that the vehicles have anti-theft devices likely to be as effective in reducing and deterring theft as parts marking. See 49 C.F.R. part 543. However, the proposed rule would impose marking requirements on *all* passenger cars and multipurpose passenger vehicles with a GVWR of 6,000 pounds or less, without need for classification as high-theft. Moreover, the statutory authority for the proposed parts marking rule is § 33103 of the Act, which covers theft prevention for "other lines," rather than § 33102, which covers "high theft lines." Thus, it appears that the regulatory provisions of part 543, which apply to *high-theft* vehicles, see 49 C.F.R. § 543.3, would be unavailable for vehicles subject to marking under the proposed rule.

The Paperwork Reduction Act notice that accompanies NHTSA's proposed rule recognizes this discrepancy. The notice states that

> [i]f this proposed rule is made final, the part 542 procedure for manufacturers to make high theft/low theft determinations of new passenger car and multipurpose passenger vehicle lines, and part 543 procedure for exemptions from parts marking for high theft passenger car and multipurpose passenger car lines would no longer be applicable. Part 542 and 543 procedures would then apply only to light trucks.

67 Fed. Reg. at 43084-43085.

If, as stated in the preamble to the proposed rule, NHTSA's intention is to continue the availability of the exemption provision for vehicles equipped with anti-theft devices, the regulatory language must be clarified. MBUSA notes that continuation of the exemption is fully consistent with the statute and its legislative history. Section 33106(b)(1) of the statute specifies that a manufacturer may petition for exemption from a standard prescribed under either § 33102 (high theft lines) or § 33103 (other lines). The clear intent of the statute therefore is to provide an exemption for vehicles equipped with anti-theft devices, regardless of whether or not the vehicles are classified as high-theft.

The legislative history supports the continued availability of the exemption provision. The legislative history indicates that Congress strongly desired to encourage development of anti-theft devices, and chose to accomplish this through the exemption provision. When the exemption provision originally was enacted in 1984, the House Energy and Commerce Committee Report stated the Committee's hope that "this section will encourage the development of new technology to deal with the auto theft problem." H.R. Rep. No. 1087, 98th Cong., 2d Sess., pt. 1, at 17-18 (1984). Similarly, the Senate Commerce, Science and Transportation Committee Report noted that in including the exemption provision, the Committee was "seeking to encourage the continued development of new and innovative technology to deal with the motor vehicle theft problem." S. Rep. No. 478, 98th Cong., 2d Sess. 15 (1984).

When the statute was amended in 1992, the House Energy and Commerce Committee Report cited statements in support of the exemption provision that were made by the Department of Transportation during the amendment process. The Department stated that the intent of the exemption provision "was to encourage the use of antitheft devices that can be shown to be at least as effective as parts marking in deterring theft." H. Rep. No 851, 102nd Cong., 2d Sess. 24 (1992). The Department noted that while at that time there was insufficient empirical data to provide clear evidence of the effectiveness of parts marking, "there is evidence . . . that antitheft devices can be extremely effective in reducing theft." Id.

The 1992 amendments reflected Congress' desire to encourage development of anti-theft devices, as well as its concern regarding the shortage of data on effectiveness of both parts marking and anti-theft devices. To address these multiple concerns, the amendments authorized a long-range review of effectiveness by the Attorney General, and made the number of future exemptions from parts marking contingent upon the Attorney General's findings. See, e.g., 138 Cong. Rec. H11819 (daily ed. October 5, 1992) (statement of Rep. Upton) ("The bill . . . encourages the continued installation of antitheft devices. The study commissioned by this legislation will provide the Secretary of Transportation and the Attorney General with a mechanism by which parts marking and antitheft technologies can be fairly evaluated to determine their effectiveness").

Unfortunately, the effectiveness study authorized by the 1992 amendments has yet to be completed, even though the amendments imposed a deadline of December 31, 1999. See 49 U.S.C. § 33103(d)(1). In the absence of any contrary findings, there is every reason to believe that the previous Congressional statements supporting the continued use of anti-theft devices remain valid, and that the exemption provisions for such devices should continue to be available.

### D. NHTSA Should Take Into Account European Community Standards

While parts marking is used in the United States as a means of addressing the vehicle theft problem, in Europe there are different methods for addressing this problem. For example, ECE R18 and 97, as well as 74/61/EEC define stringent requirements on systems for prevention of unauthorized use, immobilizers, and vehicle alarm systems. Given the global nature of the automobile manufacturing business and the increasingly-recognized importance of harmonizing standards on an international basis, NHTSA should take into consideration the need for international harmonization in amending its regulations. Such harmonization would be consistent with NHTSA's stated goals regarding international activities. For instance, in NHTSA's 1997 Report to Congress regarding the Agency's plans for achieving harmonization of the U.S. and European side impact standards, the Agency stated that

> NHTSA has long recognized the need to move forward on harmonizing existing regulations and to create a forum for international research that ensures the development of future regulations that are compatible. NHTSA has been and continues to be involved in the vehicle safety regulatory efforts of the Economic Commission for Europe (ECE) of the United Nations, the EU, as well as with the governments of Japan, Australia, and Canada. NHTSA is committed to carrying out the presidential initiatives of the New Transatlantic Agenda, including promises to achieve global regulatory uniformity and to encourage a collaborative approach in testing and certification procedures by promoting greater compatibility of standards and health and safety-related measures.

NHTSA, Report to Congress, NHTSA Plan for Achieving Harmonization of the U.S. and European Side Impact Standards (April 1997) at 1. NHTSA stated similar goals in a policy statement relating to implementation of an international agreement for establishing global technical regulations on the safety, emissions, energy efficiency and <u>theft prevention</u> of vehicles, equipment and parts. <u>See</u> 49 C.F.R. part 553, App. C, Statement of Policy: Implementation of the United National/Economic Commission for Europe

(UN/ECE) 1998 Agreement on Global Technical Regulations – Agency Policy Goals and Public Participation (listing among NHTSA's goals under the agreement to "[h]armonize U.S. standards with those of other countries or regions, particularly by raising U.S. standards at least to the level of the best practices in those other safety standards" and to "[e]nhance regulatory effectiveness through regulatory cooperation with other countries and regions, thereby providing greater safety protection with available government resources"). Harmonization of theft prevention measures, which would allow for the installation of effective antitheft systems in lieu of parts marking requirements, would help the Agency to achieve its stated goals regarding international compatibility.

## II. CONCLUSION

Based on the foregoing deficiencies in the report that provides the basis for NHTSA's proposed rulemaking, the failure by the Agency to take into account excessive costs for manufacturers such as DCAG, the deficiencies in the proposed exemption procedures and the failure to take into account harmonization issues, MBUSA believes that at a minimum, NHTSA must withdraw the NPRM as currently proposed. In order to proceed with a workable rule that conforms to all statutory mandates and the principles underlying the legislation, MBUSA urges NHTSA to correct those deficiencies prior to issuance of a new proposed rule that adequately addresses the issues identified above.

MBUSA thanks NHTSA for this opportunity to submit comments and looks forward to working with NHTSA on this important rulemaking. MBUSA invites the Agency to contact the Company in order to further discuss the proposal or the comments contained in this letter.

Sincerely,

for Steve Speth

Stephan J. Speth
Director
Vehicle Compliance & Safety Affairs